A

JAMALUDIN JAAFAR v. AFFIN BANK BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
BADARIAH SAHAMID JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEALS NO: K-02-2728-12-2013
& K-03(IM)(NCVC)-108-08-2014]
30 SEPTEMBER 2016

C ***CIVIL PROCEDURE:*** *Judgments and orders – Default judgment – Setting aside – Appeal against dismissal of application – Whether court below exercised discretion on wrong principle in rejecting application – Whether occasioned a miscarriage of justice – Whether default judgment ought to be set aside*

D ***LAND LAW:*** *Charge – Validity of – Land charged as security for loan facility – Malay reservation land – Whether can only be charged to a 'Malay' pursuant to Kedah Malay Reservations Enactment No. 63 ('the Kedah Enactment') – Whether bank a 'Malay' within meaning of s. 2 of Kedah Enactment – Bank's name not listed under Second Schedule to Kedah Enactment – Whether rendered charge null and void – Kedah Malay Reservations Enactment No. 63, s. 6(1) & (2)*

E ***BANKRUPTCY:*** *Adjudication and receiving orders – Setting aside – Orders issued pending appeal to set aside default judgment – Whether rendered appeal nugatory – Whether wrong exercise of discretion – Whether gave rise to miscarriage of justice – Whether adjudication and receiving orders ought to be set aside*

F The respondent ('Affin Bank') obtained a judgment in default against the appellant and subsequently filed a bankruptcy notice against the appellant, followed by a creditor's petition. The appellant opposed the petition and had duly served a notice of intention to oppose the petition to Affin Bank. In the meantime, the appellant also filed a summons in chambers for an order that the hearing of the creditor's petition be stayed pending disposal of his G application to set aside the default judgment. The application was granted by the Senior Assistant Registrar ('SAR'). However, the appellant's application to set aside the default judgment was dismissed by the SAR. The appellant appealed to the judge in chambers but the appeal was dismissed. Hence, the default judgment remained in force. Dissatisfied, the appellant filed the H present appeal on the grounds that: (i) the third party charge registered in favour of Affin Bank as security for the loan granted to one Teh Two Kea, trading under the style and name of Leong Hin Company, was null and void as Affin Bank is not a 'Malay' within the meaning of s. 2 of the Kedah Malay Reservations Enactment No. 63 ('the Kedah Enactment'). The appellant I himself is a Malay and the land that he charged to Affin Bank was categorised as Malay reservation land; and (ii) the court had no jurisdiction to make any order against him as he was neither the guarantor nor party to the facilities agreement between Affin Bank and the borrower, and that further he had

gained no benefit from the agreement. In short, the appellant's case was that he had a defence on the merits and for that reason the judgment in default ought to be set aside. However, despite the pending appeal herein, the SAR fixed the creditor's petition for hearing and proceeded to make the adjudication order and receiving order ('AORO') against the appellant, the subject matter of the second appeal herein.

Held (allowing appeals; setting aside default judgment and AORO)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) There are two situations where the exercise of the discretion can be assailed on appeal: (i) where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or (ii) where there has been a miscarriage of justice occasioned by the exercise of the discretion. Either situation would entitle the aggrieved party to a reversal of the decision on appeal. In the present case, the discretion was vested in the SAR and not in the Judicial Commissioner ('JC') whose role was merely to affirm or reverse the exercise of that discretion by the SAR, although she was hearing the matter afresh, being an appeal to the judge in chambers. (paras 18 & 19)

(2) The rejection by the SAR of the appellant's application to set aside the default judgment was based on the ground that since Affin Bank is a not a natural person, both under the Companies Act 1965 and under the Kedah Enactment, the third party charge registered in favour of Affin Bank was not in breach of any law and therefore, valid for purposes of the bankruptcy proceedings against the appellant. The JC, in affirming the decision, relied on the case of *Sime Bank v. Tetuan Projek Kota Langkawi Sdn Bhd* which in effect held that a Malay reservation land in Kedah could be charged to any non-natural person such as a commercial bank irrespective of whether such non-natural person is a Malay or otherwise within the meaning of s. 2 read with the Second Schedule to the Kedah Enactment. (paras 25, 27 & 30)

(3) Subsection (2) of s. 6 of the Kedah Enactment is clear and unambiguous, that any document or agreement purporting to vest in a non-Malay any right or interest in any Malay reservation land 'shall be void'. So strict is the prohibition that even an attempt at such act by a Malay is threatened by s. 7 with forfeiture of his land, which 'shall thereafter vest in the Sultan absolutely'. Further, the operative words in sub-s. (1) are 'no right or interest therein shall vest ... in any person who is not a Malay' which, having regard to the legislative scheme of the Kedah Enactment, must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee. (paras 33 & 34)

(4) The fact that the bank was a non-natural person was irrelevant because under the Kedah Enactment a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a

Malay. Although Schedule A is part and parcel of the Kedah Enactment and must not therefore be ignored, it cannot override the substantive provision, *ie*, s. 6 of the Kedah Enactment, that governs the legality or otherwise of the act of vesting in a non-Malay any right or interest in any Malay reservation land. (paras 35 & 42)

(5) The fact that Affin Bank is a non-Malay was beyond dispute as its name did not appear in the Second Schedule to the Kedah Enactment. Being not listed in the Second Schedule and therefore a non-Malay, Affin Bank is prohibited by s. 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant. (para 46)

(6) The SAR's decision to issue the AORO, which was affirmed by the JC, rendered the appellant's appeal on the default judgment completely nugatory, if not purely academic. The effect of the SAR's decision was to deny the appellant of his right to pursue his pending appeal before this court in respect of the default judgment. In the circumstances, the SAR's decision was a wrong exercise of discretion, thereby giving rise to a miscarriage of justice. (paras 50 & 51)

Bahasa Malaysia *Headnotes*

Responden ('Affin Bank') memperoleh penghakiman ingkar terhadap perayu dan seterusnya memfailkan notis kebankrapan terhadap perayu, diikuti dengan petisyen pemiutang. Perayu membantah petisyen tersebut dan menyerahkan notis niat membantah petisyen tersebut kepada Affin Bank. Sementara itu, perayu juga memfailkan saman dalam kamar bagi perintah agar perbicaraan petisyen pemiutang ditangguhkan sementara pemutusan permohonannya untuk mengetepikan penghakiman ingkar. Permohonan tersebut dibenarkan oleh Penolong Kanan Pendaftar ('PKP'). Walau bagaimanapun, permohonan perayu untuk mengetepikan penghakiman ingkar ditolak oleh PKP. Perayu merayu kepada hakim dalam kamar tetapi rayuan tersebut ditolak. Dengan itu, penghakiman ingkar tersebut kekal berkuat kuasa. Tidak berpuas hati, perayu memfailkan rayuan ini atas alasan-alasan bahawa (i) gadaian pihak ketiga yang didaftarkan berpihak kepada Affin Bank sebagai jaminan bagi pinjaman yang diberikan oleh Teh Two Kea, yang berniaga bawah gaya dan nama Leong Hin Company, adalah batal dan tidak sah kerana Affin Bank bukan seorang 'Melayu' dalam maksud s. 2 Enakmen Rizab Melayu Kedah No. 63 ('Enakmen Kedah'). Perayu sendiri berbangsa Melayu dan tanah yang digadaikan kepada Affin Bank dikategorikan sebagai tanah rizab Melayu; dan (ii) mahkamah tiada bidang kuasa membuat perintah terhadapnya kerana dia bukan penjamin mahupun pihak dalam perjanjian kemudahan itu. Secara singkatnya, kes perayu adalah bahawa dia mempunyai pembelaan bermerit dan atas alasan tersebut penghakiman ingkar sepatutnya diketepikan. Walau bagaimanapun, walaupun terdapat rayuan menunggu pemutusan di sini, PKP menetapkan

perbicaraan petisyen pemiutang dan meneruskan untuk memberikan perintah penghukuman dan perintah penerimaan ('AORO') terhadap perayu, perkara rayuan kedua di sini.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan penghakiman ingkar dan AORO)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Terdapat dua keadaan pelaksanaan budi bicara boleh dipersoalkan dalam rayuan: (i) apabila budi bicara dilaksanakan atas prinsip salah dan sepatutnya dilaksanakan dalam cara sebaliknya; atau (ii) apabila terdapat salah laksana keadilan yang dilakukan dalam melaksanakan budi bicara. Salah satu keadaan memberikan pihak yang terkilan hak kepada keputusan yang sebaliknya atas rayuan. Dalam kes ini, budi bicara terletak pada PKP dan bukan pada Pesuruhjaya Kehakiman ('PK') yang peranannya hanya mengesahkan atau mengakas pelaksanaan budi bicara oleh PKP, walaupun beliau membicarakan perkara tersebut sekali lagi, sebagai rayuan kepada hakim dalam kamar.

(2) Penolakan permohonan untuk mengetepikan penghakiman ingkar oleh PKP adalah berasaskan alasan oleh sebab Affin Bank bukan orang perseorangan di bawah kedua-dua Akta Syarikat 1965 dan di bawah Enakmen Kedah, gadaian pihak ketiga yang didaftarkan berpihak pada Affin Bank tidak melanggar apa-apa undang-undang dan oleh itu sah bagi tujuan prosiding kebankrapan terhadap perayu. Pesuruhjaya Kehakiman, semasa mengesahkan keputusan tersebut, bersandar pada kes *Sime Bank v. Tetuan Projek Kota Langkawi Sdn Bhd* yang sebenarnya memutuskan bahawa tanah rizab Melayu di Kedah boleh digadaikan kepada pihak bukan perseorangan seperti bank komersial walaupun pihak bukan perseorangan adalah Melayu atau sebaliknya dalam maksud s. 2 dibaca bersama-sama dengan Jadual Kedua Enakmen Kedah.

(3) Subseksyen (2) kepada s. 6 Enakmen Kedah adalah jelas, bahawa apa-apa dokumen atau perjanjian yang ingin meletakhakkan pada seseorang yang bukan Melayu, apa-apa hak atau kepentingan dalam tanah rizab Melayu 'adalah batal'. Larangan tersebut amat ketat hinggakan cubaan oleh seseorang Melayu dihalang oleh s. 7 dengan rampasan tanahnya, yang 'adalah selepas dari itu terletak hak pada Sultan secara mutlak'. Selanjutnya, perkataan-perkataan yang mempunyai kuat kuasa dalam sub-s. (1) adalah 'tiada hak atau kepentingan di dalamnya boleh terletak hak … kepada sesiapa yang bukan Melayu' yang, memandangkan skim perundangan Enakmen Kedah mesti merujuk pada apa-apa tindakan peletakan hak atau kepentingan dalam mana-mana tanah rizab Melayu pada bukan Melayu, termasuk tetapi tidak terhad pada 'jualan' atas permintaan pemegang gadaian.

(4) Fakta bahawa bank bukan pihak perseorangan tidak relevan kerana bawah Enakmen Kedah, pihak bukan perseorangan seperti bank komersial, syarikat milik terhad atau persatuan layak sebagai Melayu. Walaupun Jadual A adalah sebahagian Enakmen Kedah dan oleh itu, tidak boleh diabaikan, ini tidak boleh mengatasi peruntukan substantif, iaitu s. 6 Enakmen Kedah, yang menentukan kesahan atau sebaliknya tindakan peletakan hak kepada bukan Melayu terhadap apa-apa hak atau kepentingan dalam mana-mana tanah rizab Melayu.

(5) Fakta bahawa Affin Bank adalah bukan Melayu tidak boleh dipertikaikan kerana namanya tiada dalam Jadual Kedua Enakmen Kedah. Oleh sebab tidak disenaraikan dalam Jadual Kedua dan oleh itu bukan Melayu, Affin Bank dihalang oleh s. 6 Enakmen Kedah daripada memegang apa-apa hak atau kepentingan, termasuk sebagai pemegang gadaian, dalam tanah rizab Melayu yang telah digadaikan kepadanya oleh perayu.

(6) Keputusan PKP untuk mengeluarkan AORO, yang disahkan oleh PK, menjadikan rayuan perayu terhadap penghakiman ingkar tidak berguna, atau hanya akademik semata-mata. Kesan keputusan PKP adalah menafikan perayu haknya untuk meneruskan rayuannya di mahkamah ini berkenaan penghakiman ingkarnya. Dalam keadaan tersebut, keputusan PKP adalah pelaksanaan budi bicara yang salah, dengan itu menjurus kepada salah laksana keadilan.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Ho Giok Chay v. Nik Aishah [1960] 1 LNS 38 HC ***(refd)***

R v. Duke (1985), [1985] 6 WWR 386 ***(refd)***

R.A.P. Nathan v. Hj Abdul Rahman Hj Yusoff & Ors [1979] 1 LNS 85 HC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***

Sime Bank Bhd v. Tetuan Projek Kota Langkawi Sdn Bhd [1999] 1 CLJ 307 HC ***(dist)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 BLJ 123 SC ***(refd)***

Legislation referred to:

Enactment No. 63 (Malay Reservations), ss. 2, 6(1), (2), 7, 19, Schedule A, Second Schedule

Rules of Court 2012, O. 19 r. 9

The Malay Reservations Enactment 1930, s. 7

For the appellant - P Latsmanan; M/s Khor Gaik Thiam & Latsmanan
For the respondent - Ong Bee Khoon & Lim Poh Leong; M/s Gibb & Co

[Editor's note: Appeal from High Court, Alor Setar; Bankruptcy No. 29NCVC-1541-07-2012 (overruled).]

Reported by S Barathi

JUDGMENT

Abdul Rahman Sebli JCA:

[1] There were two appeals before us. The first was against the dismissal by Zakiah Kassim JC of the appellant's appeal against the decision of the learned Senior Assistant Registrar ("SAR") on 12 September 2013 who rejected the appellant's application to set aside the default judgment entered against him on 16 October 2011.

[2] The second appeal was against the dismissal by Abu Bakar Katar JC of the appellant's appeal against the decision of the same SAR who made an adjudication order and receiving order ("the AORO") against the appellant on 26 February 2014. The AORO arose directly from the default judgment entered against the appellant on 16 October 2011. The judgment creditor in the bankruptcy matter was Affin Bank Berhad, the respondent in these appeals ("Affin Bank").

[3] Having heard arguments from both sides, we allowed both appeals by a unanimous decision and set aside both the judgment in default and the AORO. We now provide the grounds for our decision.

[4] The material facts giving rise to these appeals are as follows. On 16 October 2011 *vide* Alor Setar High Court Civil Suit No. 22-189-06-2011, Affin Bank obtained judgment in default against the appellant whereby the appellant was ordered to pay Affin Bank a sum of RM998,527.86 with interest at the rate of 3.5% per annum calculated on a monthly basis from 1 April 2012 until full payment.

[5] On 16 July 2012 Affin Bank filed a bankruptcy notice against the appellant, followed by a creditor's petition six months later on 22 January 2013. The appellant opposed the petition and had duly served on Affin Bank his notice of intention to oppose the petition. In the meantime, the appellant filed a summons in chambers seeking an order that the hearing of the creditor's petition be stayed pending disposal of his application to set aside the default judgment. The application was granted by the learned SAR on 22 May 2013.

[6] The appellant's application to set aside the default judgment was heard and dismissed by the learned SAR on 12 September 2013. The appellant appealed to the judge in chambers against the decision but was dismissed by Zakiah Kassim JC on 13 November 2013. The judgment in default therefore remained in force.

[7] Dissatisfied with the decision, the appellant filed an appeal to this court and the appeal was registered as Civil Appeal No. K-02-2728-12-2013 and the memorandum of appeal had been filed. The appellant had also filed the appeal record, the additional appeal record, the additional appeal record (2) and the additional appeal record (3). The appeal was fixed for hearing on 14 July 2015.

[8] The main ground of appeal raised by the appellant in the memorandum of appeal was that the default judgment ought to be set aside as the third party charge registered in favour of Affin Bank as security for the loan granted to one Teh Two Kea trading under the style and name of Leong Hin Company was null and void as Affin Bank is not a "Malay" within the meaning of s. 2 of the Kedah Malay Reservations Enactment No. 63 ("the Kedah Enactment"). The appellant himself is a Malay and the land that he charged to Affin Bank is categorised as Malay reservation land.

[9] The other ground relied upon by the appellant was that the court had no jurisdiction to make any order against him for the reason that he was neither the guarantor nor party to the facilities agreement between Affin Bank and the borrower, and that further he had gained no benefit from the agreement. In short, the appellant's case was that he had a defence on the merits and for that reason the judgment in default ought to be set aside.

[10] The law is trite that a defence on the merits is a ground for setting aside a judgment entered by default. Despite the pending appeal before this court, which on the face of it contained grounds which merited consideration, the learned SAR fixed the creditor's petition for hearing on 13 January 2014. Learned counsel for the appellant applied for a deferment of the hearing pending disposal of the appellant's appeal to this court on the default judgment but the learned SAR refused to entertain the application. Instead, she fixed 26 February 2014 as the final date for hearing of the petition.

[11] On the hearing date, ie, on 26 February 2014 learned counsel for the appellant again applied for the hearing of the creditor's petition to be deferred until after the appellant's appeal to this court against the default judgment had been disposed of. Learned counsel for Affin Bank objected to the application on the ground that the appellant's application to set aside the default judgment had been rejected by the learned SAR and the decision had been affirmed by Zakiah Kassim JC.

[12] The learned SAR acceded to Affin Bank's objection and proceeded to hear the creditor's petition at the conclusion of which she made the impugned AORO. The appellant appealed to the judge in chambers against the decision but was dismissed by Abu Bakar Katar JC on 11 August 2014. With this decision, there were now two orders subsisting side by side against the appellant, first the judgment in default dated 16 October 2011 and second the AORO dated 26 February 2014. These were the subject matters of the two appeals before us.

[13] We shall deal with the appeal against the decision of Zakiah Kassim JC first, not only because it was first in time to be filed but also because if we were to allow the appeal and set aside the default judgment, the decision of Abu Bakar Katar JC affirming the decision of the learned SAR to issue the AORO would have to be set aside as a sequitur because with the setting aside of the default judgment, the whole substratum of the AORO on which the decision was based would no longer be in existence.

[14] Under O. 19 r. 9 of the Rules of Court 2012, the courts have the discretion to set aside or vary any default judgment. The appellant's argument is that the learned SAR had exercised the discretion wrongly against him and that the learned JC perpetuated the error by affirming the decision and in finding that he had failed to show a defence on the merits.

[15] The reason given by Zakiah Kassim JC for affirming the learned SAR's decision was that the learned SAR committed no error in exercising her discretion not to allow the appellant's application to set aside the default judgment, citing *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 BLJ 123; [1993] 2 MLJ 217.

[16] Learned counsel for Affin Bank urged upon us to dismiss the appeal as both the learned SAR and the learned JC were right in finding that the appellant had not shown a defence on the merits. It was argued that the third party charge was valid as the question is not whether the land that the appellant charged to Affin Bank is a Malay reservation land but whether the land could be charged to a company that is not a Malay.

[17] The correct approach to be adopted by an appellate court in dealing with the exercise of discretion by a lower court has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 in the following terms at p. 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam*).

[18] There are therefore two situations where the exercise of the discretion can be assailed on appeal:

(a) Where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) Where there has been a miscarriage of justice occasioned by the exercise of the discretion.

[19] Either situation would entitle the aggrieved party to a reversal of the decision on appeal. It is important to appreciate that in the present case, the discretion was vested in the learned SAR and not in the learned JC whose role was merely to affirm or reverse the exercise of that discretion by the learned SAR although she was hearing the matter afresh, being an appeal to the judge in chambers.

[20] The question that called for our consideration was whether the learned SAR had exercised her discretion properly when she rejected the appellant's application to set aside the default judgment. More specifically the question was whether she had sufficiently applied her mind to the question of whether the appellant had shown a defence on the merits, granted that the judgment in default was obtained regularly.

[21] It needs no emphasis that a judicial discretion is a discretion that is to be exercised judiciously, not at a whim or fancy. It is an exercise that involves weighing up all sides and taking into account opposing points of view, separating the wheat from the chaff. It is a rational, sober, sound, sagacious and considered decision. It is never a split-second decision, much less a decision that is made on the spur of the moment in the heat of argument and without getting the facts right.

[22] As we mentioned, the learned JC's finding was that the learned SAR had exercised her discretion correctly in rejecting the appellant's application to set aside the default judgment. There is nothing wrong with this approach but our reservation is with the learned JC's failure to sufficiently consider whether the decision by the learned SAR had given rise to a miscarriage of justice.

[23] In the context of a judicial proceeding both civil and criminal, the term 'miscarriage of justice' refers to a judicial act that is clearly mistaken, unfair or improper. A miscarriage of justice arises when the mistaken, unfair or improper judicial act results in prejudice or injustice to the party affected by the decision. A familiar example is where a man is convicted of an offence he did not commit or, in the context of a civil suit, a party is found liable for a civil wrong he is not responsible for.

[24] Proof of actual prejudice resulting from an error of law is not a prerequisite to a finding that a miscarriage of justice has occurred. In this regard, we should perhaps reproduce what Justice McClung of the Alberta Court of Appeal wrote in *R v. Duke* (1985), [1985] 6 WWR 386 in reference to an appeal on the Canadian Criminal Code, as follows:

> ... the determination of whether a miscarriage of justice has occurred rests on broader considerations than those attaching to the demonstration of a substantial wrong. Proof of actual prejudice resulting from an error of law is not requisite to a finding that a miscarriage of justice has occurred. It may be enough that an appearance of unfairness exists.

[25] We do not have the benefit of the grounds of decision by the learned SAR but going by the learned JC's reasoning and the submissions of the parties both before us and in the court below, it appears that the rejection by the learned SAR of the appellant's application to set aside the default judgment was based on the ground that since Affin Bank is a not a natural person both under the Companies Act 1965 and under the Kedah Enactment,

the third party charge registered in favour of Affin Bank was not in breach of any law and therefore valid for purposes of the bankruptcy proceedings against the appellant.

[26] The learned JC correctly identified this issue as being determinative of the appellant's application to set aside the default judgment. The question therefore is whether she was right in finding that there was no contravention of the law when the Malay reservation land was charged to Affin Bank, a non-Malay under the Kedah Enactment. If the appellant was right on this point, then it must follow that the learned SAR and the learned JC were both wrong in refusing to set aside the default judgment.

[27] In arriving at her decision, the learned JC relied heavily on the judgment of Hishamudin Yunus J (as he then was) delivered 17 years ago in *Sime Bank Bhd v. Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 1 CLJ 307. Two things must be kept in mind when considering this case. Firstly, the charged land was a Malay reservation land and secondly, the chargee bank (Sime Bank) was a non-Malay within the meaning of s. 2 of the Kedah Enactment.

[28] The issue in that case, like the issue before us, was whether under s. 6 of the Kedah Enactment, a Malay reservation land could be charged to the plaintiff bank, a non-Malay. While acknowledging that the object of the Kedah Enactment was to protect Malay rights by preventing reservation lands from falling into the hands of non-Malays, the learned judge nevertheless went on to hold:

> (a) under the State of Kedah Malay Reservation Enactment, the Plaintiff, although being a company and therefore not a Malay as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land.

[29] From our reading of the judgment, the sheet anchor of the learned judge's reasoning was that since the word "Malay" in s. 2 of the Kedah Enactment only refers to natural persons and not to non-natural persons, the plaintiff bank being a non-natural person was neither Malay nor non-Malay and as such was not caught by s. 6 of the Kedah Enactment which prohibits a non-Malay from holding any right or interest in any Malay reservation land. The word "Malay" is defined by s. 2 to mean:

> a person professing the Muslim religion and habitually speaking the Malay language of whose parents one at least is a person of Malayan race or of Arab descent.

[30] The effect of Hishamudin Yunus J's decision is that a Malay reservation land in Kedah could be charged to any non-natural person such as a commercial bank or a licensed "Along" operating as a private limited company irrespective of whether such non-natural person is a Malay or otherwise within the meaning of s. 2 read with the Second Schedule to the Kedah Enactment.

[31] With all due respect to the learned judge, we must say at the outset that we are unable to accept his reasoning as a correct proposition of law. To give s. 6 of the Kedah Enactment the construction that the learned judge had given would be to give a construction that would defeat the object of the provision rather than to put its object into effect.

[32] The issue before His Lordship was a straightforward issue of whether any right or interest in any Malay reservation land could vest in a non-Malay. The answer to the question is self-evident in s. 6 itself, which we reproduce below for ease of reference:

> 6.(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[33] Subsection (2) above is clear and unambiguous, that any document or agreement purporting to vest in a non-Malay any right or interest in any Malay reservation land "shall be void". So strict is the prohibition that even an attempt at such act by a Malay is threatened by s. 7 with forfeiture of his land, which "shall thereafter vest in the Sultan absolutely".

[34] The operative words in sub-s. (1) are "no right or interest therein shall vest ... in any person who is not a Malay" which having regard to the legislative scheme of the Kedah Enactment must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to "sale" at the instance of a chargee.

[35] As the plaintiff bank in that case was a non-Malay, the vesting in the bank of interest in the Malay reservation land in question by way of the third party charge was therefore null and void and of no effect. The fact that the plaintiff bank was a non-natural person was irrelevant because under the Kedah Enactment a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay.

[36] Even the Malayan Borneo Building Society is a "Malay" under the Kedah Enactment although obviously it is a not a natural person (see the Second Schedule). The long list of non-natural persons in the Second Schedule dispels any notion that only natural persons can qualify as "Malay" under the Enactment.

[37] The flaw in the learned judge's reasoning is that it did not read into s. 6 the provisions of s. 19 read together with the Second Schedule to the Kedah Enactment. If he had, His Lordship would have realised that although Sime Bank, the plaintiff in that case, was a non-natural person, it would have qualified as a "Malay" under the Enactment had it been declared as a Malay by the Ruler-in-Council pursuant to s. 19, which provides as follows:

> 19. Power to declare other person to be Malay.
>
> The Ruler-in-Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term "Malay" wherever it shall occur in this Enactment or in any amendment or re-enactment thereof.

[38] Thus, the reason why Sime Bank was not a "Malay" within the meaning of s. 2 of the Kedah Enactment was not because it was not a natural person as opined by the learned judge but because it had never been declared as a Malay by the Ruler-in-Council pursuant to s. 19. In the circumstances, we are constrained to hold that *Sime Bank* was decided *per incuriam* and can no longer be regarded as good law insofar as it ruled that a Malay reservation land could be charged to a non-Malay.

[39] In *R.A.P. Nathan v. Haji Abdul Rahman Haji Yusoff & Ors* [1979] 1 LNS 85; [1980] 1 MLJ 248, a case which the learned judge followed, Syed Agil Barakbah J (as he then was) by way of obiter held the following view at p. 251:

> In the second paragraph of the Schedule it is stated that all documents of title except permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the [Kedah] Enactment allows reservation land to be charged to a non-Malay.

[40] The second paragraph of the Schedule that Syed Agil Barakbah J referred to in the above passage is in fact the third paragraph of Schedule A to the Kedah Enactment which reads:

> All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

[41] There seems to be a conflict between this paragraph and s. 6(2) of the Kedah Enactment. This paragraph says that documents of title may be charged to "anyone" (which necessarily includes a non-Malay) except that the land may be sold only to a Malay if the chargor does not pay the money due, whereas s. 6(2) says that the vesting of any such "right" or "interest" in a non-Malay "shall be void".

[42] The view that we take on this apparent legislative discrepancy is that although Schedule A is part and parcel of the Kedah Enactment and must not therefore be ignored, it cannot override the substantive provision that governs the legality or otherwise of the act of vesting in a non-Malay any right or interest in any Malay reservation land, and that provision is s. 6 of the Kedah Enactment. In fact, the last paragraph of the Schedule that Syed Agil Barakbah J referred to in *R.A.P. Nathan (supra)* contains the following endorsement:

> This notice is **published for information** only and **shall not be deemed to vary the provisions of this Enactment**.
>
> (emphasis added)

[43] In our view, the correct position of the law on the subject is the dictum of Hepworth J in *Ho Giok Chay v. Nik Aishah* [1960] 1 LNS 38; [1961] 1 MLJ 49 where the learned judge said at p. 53:

> In my opinion, therefore, the charges with which we are concerned constitute a breach of the provisions of subsection (i) of section 7 of the Reservations Enactment. That being so, by virtue of the provisions of sub-section (i) of section 12 of that Enactment these charges are null and void.

[44] We are mindful of the fact that the decision was made in the context of s. 7 of the then Kelantan Malay Reservations Enactment 1930 which admittedly is not similar word for word with the wordings of s. 6 of the Kedah Enactment but that in our view is of no consequence because the pith and substance of both provisions is to prohibit any Malay reservation land from being vested in any person not being a Malay. We hasten to add that it is not for the courts to question the wisdom behind these legislations.

[45] In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 the Federal Court was dealing primarily with the issues of *res judicata* and the inherent power of a court of unlimited jurisdiction to set aside its orders made in breach of written law but the following observations by Gopal Sri Ram JCA (as he then was) in dealing with the scope and extent of the protection given by the Malay Reservation Enactment (FMS Cap 142) are illuminative. This is what His Lordship said:

> What became void in consequence of the breach of the Enactment was the charge that the appellants had created over the land. With it fell the annexure that contained the contract between the appellants and the respondent. The contract of loan between Ismail and the respondent continued to be perfectly valid since it did not offend the provisions of the Enactment. But no benefit whatsoever passed from the respondent to the appellants under either contract. The appellants were not parties to the loan agreement. Neither did they receive any benefit under the annexure to the charge. Indeed, what they suffered was a detriment because they put their property at risk.

[46] Back to the present appeal, the fact that Affin Bank is a non-Malay is beyond dispute as its name does not appear in the Second Schedule to the Kedah Enactment. There are presently only two banks listed in the Second Schedule, namely Bank Bumiputra Malaysia Bhd and Bank Pertanian Malaysia Bhd. Being not listed in the Second Schedule and therefore a non-Malay, Affin Bank is prohibited by s. 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant.

[47] It was for these reasons that we allowed the appellant's appeal against the decision of Zakiah Kassim JC and set aside the default judgment. We indicated that the outcome of this appeal would determine the outcome of the appeal against the decision by Abu Bakar Katar JC on the AORO. For completeness however, we feel obliged to touch briefly on the appellant's appeal against the decision.

[48] Only one issue was raised by the appellant before the learned JC, and that is whether the learned SAR was right in refusing to postpone the hearing of the creditor's petition pending disposal of his appeal to this court to set aside the default judgment.

[49] The main thrust of the appellant's argument was that the learned SAR's decision to proceed with the hearing of the creditor's petition despite knowing that there was an appeal pending before this court to set aside the default judgment was a travesty of justice in that the AORO effectively denied him of his right to pursue his appeal against the decision of Zakiah Kassim JC in affirming the learned SAR's decision on the default judgment.

[50] We were inclined to agree with the appellant because for all practical purposes, the decision by the learned SAR to issue the AORO which the learned JC affirmed rendered the appellant's appeal on the default judgment completely nugatory, if not purely academic.

[51] There can be no argument that the effect of the learned SAR's decision was to deny the appellant of his right to pursue his pending appeal before this court in respect of the default judgment. The decision by the learned SAR was, in the circumstances, a wrong exercise of discretion, thereby giving rise to a miscarriage of justice in the sense we have explained earlier in this judgment. The AORO must therefore be set aside.